

Between the signs of transition's justice

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“Post” does not arrive of its own accord, at least if the promise of justice in the aftermath is to count for more than fate. In the theory and practice of transitional justice, an increasingly central element of contemporary human rights discourse, there is then a road (yet) to travel, a path on which we may struggle to recognise the choice(s) of our words. Here, I would like to reflect briefly on this perhaps rhetorical path — it is rarely acknowledged as such — and to do so in order to consider the directions in which the work of transitional justice is being pushed and pulled.¹ Where is transitional justice policy headed with respect to the problem of how societies (and individuals) emerge from and move beyond deep division, including the collective and individual trauma of systematic violence? How does the theory and practice of transitional justice conceive the distance that must be traversed in order to realise one of its oft-repeated goals, the move from past to future? What baggage must be shed or carried to reach this new beginning?

While these are general questions that cannot be fully approached let alone answered here, they are important nevertheless as their terms betray that transitional justice is a relatively new and unsettled concern — the UN, for one, only began to employ the term with any precision in 2004.² Moreover, these questions suggest that transitional justice may be a bit lost, although it would be more accurate to say that it is divided from itself, torn in two directions. More accurate still would be to say that transitional justice abides in a kind of *stasis*, literally a “language trouble” that stems from diverging (some say, incommensurable), although poorly theorised accounts of the transition — the concept, work, and event of transition — that occasions, modifies, and perhaps emerges with(in) transitional justice.³ This then is my quite limited and somewhat artificially demarcated concern, a reflection on the implied and articulated temporal paths (or premises) of transitional justice, one that tries to go just a bit beyond the reductive and frequently invoked distinction between the provision of amnesty and the production of memory — time lost or time accounted for. In doing so, I hope to shed a bit of light on a relatively new element of transitional justice policy, a “right to

¹ On the larger question of rhetoric's place in the discourse of human rights, see Erik Doxtader, “The Rhetorical Question of Human Rights — A Preface”, *Quarterly Journal of Speech* 96, 4 (2010): 353-379.

² For one of the first direct appeals to transitional justice within the confines of the UN, see Report of the Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, 23 August 2004 (S/2004/616).

³ Barbara Cassin, “Politics of Memory: On Treatments of Hate”, *Javnost: The Public* 8 (2001):9-22.

truth” that has not received significant attention and which may warrant our concern for the way in which it defends what may prove to be an exceptional, an exception-making, vision of rule of law.

What is the transition presupposed in “transitional justice”? Let me approach this question indirectly, from one source of the question’s provocation, a slogan that has provoked significant and ongoing debate over how to define and practice transitional justice. Reproduced below (A.), this slogan is a sign in several senses. Most simply, it forms a banner. Given to marking an occasion, it signifies a place and mode of public discourse, a forum dedicated — in name — to the taking place of language. It is a bit redundant. As at least this particular version lacks punctuation, perhaps in a sort of thin Lacanian sense, the slogan points to a transition, a moment in which things are not as they seem, and a time in which what seems to be is not (yet). As this uncertainty applies to the slogan itself, it is a source of doubt if not controversy; we are torn over how to judge the veracity and felicity of its appearance, a rhetorical appearance and the appearance of a rhetoric that, together, may reveal and disclose as much as it obscures and conserves. Read today, this cut is an exigence, a sign of the unforgettability of the forgotten, a remnant that has yet to come to legibility.⁴



Most will recognise this banner as the announced calling and presented calling card of South Africa’s Truth and Reconciliation Commission. This body emerged partly, but only partly, from the post-amble of the 1993 interim constitution, a document that ended statutory apartheid and which held that “reconciliation between the people of South Africa” warranted the creation of an amnesty for the “acts, omissions and offences associated with political

⁴ Giorgio Agamben, *The Time that Remains*, Patricia Dailey, trans. (Palo Alto: Stanford UP, 2005): 39-40.

objectives and committed in the course of the conflicts of the past".⁵ The Commission itself began work in 1996, under the auspices of legislation that begged more questions than it answered. With its three basic committees charged respectively to hear testimony from victims of apartheid-era violence, adjudicate amnesty applications from perpetrators, and formulate recommendations for reparation, the Commission's efforts were justified publicly through a "campaign of persuasion" that included then Minister of Justice, Dullah Omar's claim that the TRC was "building a future for South Africans" and that "as there is a conflict between what the international community is saying and what is in the interests of the people of South Africa then I think that we will have to live with that kind of conflict".⁶ And conflict there was, particularly around the matter of amnesty. As it convened in East London for its first victims' hearings, the Commission found itself set to embark on what Antjie Krog would later refer to as a process of giving stories so as "not to die of life", a making (up) with language that was defended by some as a promising and "unique experiment" and condemned by others for condoning impunity at the cost of the country's new constitution.⁷

This ambivalence is embodied in the TRC's banner. And, it is important to note that this banner was neither the first nor the last of its kind. In East London, the banner outside the hearing hall declared: "The Truth Heals". Only several months into its work, with the hiring of a Johannesburg public relations firm, did the Commission begin to feature the slogan that then appeared consistently at its hearings, although there were still other variations, some of which set a colon after "Truth" and others which placed a period after both "Truth" and "Reconciliation". Looking again at the version of the banner here, one is struck by a double and interlocking absence: there is no indication that the TRC is a South African event or that it is an event at all. Rendered anonymous or perhaps universal, the Commission does not convene under the banner of an action; a verb that articulates the link between its key terms. At best, we might speculate that the Commission holds within it a commissioning, a calling to set out on a mission or perform work for another (not infrequently an act and work of artistry). While such an interpretation may be a stretch, it is also productive to the degree that it highlights the terms on the banner that are frequently overlooked or reduced, ironically, to a placeholder. Reading horizontally, if not a bit too literally, the

⁵ The post-amble has become an altogether easy "origin" of the TRC, a view that comes at the cost of understanding reconciliation's much longer and richer history in South Africa. I have addressed this elsewhere. See Erik Doxtader, *With Faith in the Works of Words: The Beginnings of Reconciliation in South Africa, 1985-1995* (Cape Town/Lansing: David Philip/Michigan State University Press, 2009).

⁶ Dullah Omar, Testimony delivered to Parliament's Joint Committee on Justice with regards to the Promotion of National Unity and Reconciliation Bill (Cape Town: Archives of Parliament, 31 January 1995): 55.

⁷ Antjie Krog, *Country of My Skull* (New York: Times Books, 1998): 64.

Truth and Reconciliation Commission leads to “the road to”, a phrase that stands ambiguously between “truth” and “reconciliation”; in turn, reading vertically, the passage of “the road to” that links truth and reconciliation can be undertaken from two directions — top to bottom or bottom to top. As the Commission was something of a road show, a travelling body that convened in many dusty dorps, the banner also offers a visual pun with “the road to” and either “reconciliation” or “truth” occupying two lanes, with the ‘third term’ relegated to the shoulder, a position that is not without meaning, at least if considered in light of South African highway etiquette.

When confronting the question of what is happening on, in, or along the TRC’s road, it is important to recall that another name for road is ‘method’. Drawing from the ancient Greek (*hodos* and *methodos*), the Commission’s middle and perhaps operative term may refer to the path of a journey, a system or sequence of thought, a principle of beginning, a mode of pursuit or an intended direction, a means of discovery (recognition), or a way of speaking and acting. Fixing relative position and enabling (a leading) movement, the road that appears between truth and reconciliation may signal the start of an open-ended excursion, a dedicated search, or a passing between more or less familiar points. It may be unidirectional or a byway which may or may not allow u-turns. It may be walked along or crossed, the latter being an idea that is usually reserved for jokes but which adds important senses of proximity and relation to the problem — there is a difference in approach to the neighbour across the street and those living down the freeway. In either direction, however, the road’s span constitutes a spatio-temporal measure of linkage and separation. If it runs forth from inside to outside the city-state, the road may involve taking leave of *logos* and *nomos*, the words and law that define home.⁸ In antiquity, it was the figure of theory, the *theoros*, that walked this path. Called to wander toward wonder and then return with a meaningful account of unfamiliar spectacles and strange oracles in need of translation, theory’s road is a place (out of place) and a time (out of time) characterised by (dis)connection and the (im)potential for recognition in the midst of contingent encounter.⁹

The road opens (onto) the *question* of method. Understood as a way of encountering and conceptualising the traversal of space and the passage of time, the figure of the road thus serves to announce if not enact the problem of what it means to be(come) in(to) transition. Simultaneously, a moment between the times in which there may be no time at all and the

⁸ In the South African case, this precise dynamic proves a crucial point for reflection in light of apartheid’s obsession with raced-based zoning.

⁹ For accounts of this early sense of theory and the movements of the theorist see, among others, Andrea Nightingale, *Spectacles of Truth in Classical Greek Philosophy* (Cambridge: Cambridge University Press, 2004); For a subtle reflection on one of theory’s central “objects,” the Olympics, see Philippe-Joseph Salazar, “Rhetoric on the Bleachers or, The Rhetorician as Melancholiac”, *Philosophy & Rhetoric* 41, 4 (2008): 356-374.

movement of (a) being (between) somewhere/something and nowhere/nothing, the opening of a transition strains reference, sense, and relation. This tension may be intractable, at least as the announced (purposive) value of a transition presupposes precisely what must be created *through* transition. Within the context of the TRC and the larger issue of transitional justice, this means that the onset of transition brings a need to define and plot the relationship between such goods as truth and reconciliation at the same time that it renders the grounds of definition and interaction contingent if not suspect. In short, the method of transition begins with the *puzzle* of what it means to create the potential for shared meaning in time.

In the last several years, theories of transitional justice have offered several ways of putting the puzzle pieces together. One significant approach proceeds by figuring transition as a site of conversion, a moment of radical presence that blurs truth and reconciliation to the point where their difference fades. On the road, we lose our way (sight) in the name of learning how to begin again. As it echoes, if not follows, the Pauline tradition, the experience of transition calls us to stand as we are not; forsaking the words of law that have funded and rationalised division and violence exposes a vulnerability, a constitutive weakness (a loss of identity), in which it is possible to hear the word which holds the potential to turn enmity into a new time of friendship.¹⁰ Grounded then in no good reason, a gift without question of desert, the messianic truth of reconciliation is, as Agamben puts it, a “justice without law”, a “pure potentiality of saying” that refuses the “juridicising of all relations” and uncovers the “revelation of language itself” as a basis for abiding in a present that cuts the stranglehold of fate’s repetition.¹¹

While there is no doubt that the South African TRC proffered and defended something of this logic, in part due to the larger political-cultural and tradition reconciliation on which it rested, the more apt (secular) parallel may be the Greek amnesty of 403 BC, an edict that rendered a state of emergency inoperative by calling on perpetrators to account for their actions (or accept exile) and forbidding citizens to recall these past events. Arguably this prohibition served less to induce or condone amnesia than to displace memory from the law into the commons, a shift that aimed to return the ability of citizens to make and perform the oaths that compose the meta-conditions of collective life and the meta-normative grounds of law itself.¹² Like its religious counterpart, this approach invites combatants, along with perpetrators and victims, to appear before one another without standing, without precedent’s guidance or identity’s banister. The risk of such

¹⁰ Here, there is an important emphasis placed on what Arendt called “legal violence”, a concern that has not featured in the UN’s deliberations on transitional justice.

¹¹ Agamben, *Time that Remains*, 107, 135.

¹² For a fuller account, see Erik Doxtader “Easy to Forget or Never (Again) Hard to Remember? History, Memory and the ‘Publicity’ of Amnesty”, in *The Provocations of Amnesty: Memory, Justice and Impunity*, E. Doxtader and C. Villa-Vicencio, eds. (Cape Town: David Philip, 2003).

transition, a (re)turn to the potential for that recognition which goes well beyond a multiculturalist inculcation of tolerance, is the sacrifice by which it is inaugurated, a sovereign sacrifice of interest that is easily refused by the guilty and which leaves the innocent to abide in the artifice of a beautiful soul's story that arrives with no assurance of audience. In the transition that functions as a timeless present, a now-time for all time, the burden of life is not fate but its radical contingency.

The second and increasingly dominant approach to the transition that conditions transitional justice is far more linear and rests increasingly on a "right to truth". On this view, transitional justice proceeds from an asserted right of truth-telling and truth-being-told, a capacity and demand for an account(ing) (*logos*) of one's self that both follows from and composes the law's (*nomos*) mediation of morality and politics.¹³ As old as its counterpart, this (unforgiving) power of (the) giving (of) voice to truth in the name of justice entails the forensic-testimonial (re)presentation of memory to ensure the production and reproduction of history, an archive that documents, recognises, and aims to repair the costs of violence.

While it now counts as the mainstream premise of contemporary policy, this view of transitional justice found significant form in an influential 1997 UN report, entitled the "Question of the Impunity of Perpetrators of Human Rights Violations". Backed by decisions from the Inter-American Court for Human Rights and the penumbra alleged to emanate from various human rights conventions, the report begins with the claim that "there can be no just and lasting reconciliation without an effective response to the need for justice".¹⁴ All but forbidding the provision of amnesty to perpetrators, it goes on to contend that, "Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes".¹⁵ In recent years, this claim has become a central focus of transitional justice policy-making. The recently ratified *Convention for the Protection of All Persons From Enforced Disappearances* holds that victims have "the right to know the truth regarding the circumstances of enforced disappearances" and has supported efforts to ground transitional justice on a right to truth that, according to a 2007 General Assembly resolution, "presupposes the disclosure of the whole and complete truth about the

¹³ Michel Foucault, *Fearless Speech*, Joseph Pearson, ed. (Cambridge: Semiotext(e), 2001): 105.

¹⁴ Commission on Human Rights, "The Administration of Justice and the Human Rights of Detainees — Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)", E/CN.4/Sub.2/1997/20/Rev.1, 1997, 4. In a much more extensive study, I have considered the development of transitional justice policy at the UN. See Erik Doxtader, "A Critique of Law's Violence Yet (Never) to Come: United Nations' Transitional Justice Policy and the (Fore)closure of Reconciliation", in *Theorising Post-Conflict Reconciliation: Agonism, Restitution & Repair*, Alexander Hirsch, ed. (Routledge, forthcoming, 2011).

¹⁵ Commission on Human Rights, "The Administration of Justice", 10.

events that occurred, the specific circumstances attending them and the individuals involved, including the circumstances in which the violations were committed and the reasons for their commission".¹⁶

Held to be inalienable and non-derogable, the "right to truth" has served to legitimise what have been recently defined as the appropriate "tools" of transitional justice.¹⁷ With this machinery comes a specific view of transition itself, one that is defined by a proceduralist case for the priority and presence of truth and reparation within "any peace and reconciliation scheme".¹⁸ Distinct from the questions left open (or undecidable) by the South African TRC's banner, this position firmly "resolves" reconciliation's position in the transitional justice equation — it is an end and only an end, a state of affairs that follows and which can only follow from a process of truth-telling that is conditioned by and additive to the rule of law. Accordingly, precedent, memory, history (and back to precedent) are the order of transition's day, a point made altogether clear by Madeline Albright's pronouncement that "Truth is the cornerstone of the rule of law. ... And it is only the truth that can cleanse... and begin the healing process".¹⁹ While the vigour of this faith may well give the most devout interpretation of reconciliation a run for piety's money, the more important issue is the way in which such a call to truth conceives transition as a linear event to be managed, an object of law that opens and gains from a truth-telling that, even if epidictic, proceeds within a developmental and diachronic model of wound, treatment, and healing. Warranted by a promise of law's grant of recognition, a status given and controlled *by* the law, the transition is not an event that interrupts the conceptual-historical continuity of juridical power in the name of asking whether and how to (re)constitute the law's underlying rule of recognition. One can speculate as to the ways in which this may re(inaugurate) the potential for bio-politics, particularly as subjects are hailed to a process of truth-telling given to fashioning the appearances of their legitimate standing. For now, the point is that the transition presupposed by a "right to truth" based model of transitional justice is a chronological form. It is a *chronos* indemnified from reconciliation's *kairos* in the name of reversing the causality of fate, a turn against the expressed hostility of life that proceeds by fating the cause of dignified words.

¹⁶ Report of the Office of the High Commissioner for Human Rights, "Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council' — Right to Truth", (A/HRC/5/7), 7 June 2007, 16.

¹⁷ See, for one, Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post Conflict States — Truth Commissions*: 2006.

¹⁸ Report of the Office of the High Commissioner for Human Rights, "Implementation of General Assembly Resolution 60/251", 13.

¹⁹ Cited in Yasmin Naqvi, "The Right to Truth in International Law: Fact or Fiction", *International Review of the Red Cross* 88, 862 (June 2006): 245.

In moving to conclude, it would seem that we are left between two modes of transition. On one path, this difficult moment holds a messianic call to (re)turn to the relational potential of language. On the other, there is a clock-bound duty to express the experience that produces collective progress. Largely from the latter, there has appeared an argument that these views are incommensurable, at least if the legal procedures of truth-telling are not granted prior (bordering on mythical) status. From the former, it has been heard that these diverging methods might be reconciled, although the argument is trite until such a time as its adherents can provoke a serious debate in policy circles about the meaning and operativity of reconciliation. As little attention has been paid to whether and how transitional justice abides within or composes transition, the same need for discussion exists in respect to whether these two accounts can be differentiated on the grounds that violence and atrocity have various and variable forms. There is also the more straightforward possibility that transitional justice has been misnamed, or named to legitimise the work of what some see as a colonising force. Both avenues are susceptible to this charge, at least as, on the one hand, a faith-in-the-word-for-now may entail a self-sacrificing commitment to ambiguity and as, on the other, an addiction to rule of law may consolidate expression at the cost of creativity and an understanding of “legal violence”.

If these are concerns that merit attention, the larger question is deeply rhetorical — in the best and worst senses — in that it calls for inquiry into the meaning of the appearances that emerge through the taking place of that language given to making time. Today, at a moment when proponents of transitional justice stand on their respective paths, look over, and accuse the other of hypocrisy, of being other than they seem, of producing semblance or duplicitous misdirection, the occasion of transitional justice that actually includes a sense of its occasion, may rest on a thinking of the transitional, a theorising of method’s road as a “scene of address” for those “acting words” that contain the potential for a judgment that is less a given law or faith as the constitutive and ongoing struggle of recognising.²⁰ To disavow such discovery, as Richard McKeon suggested quite forcefully in the months prior to the authorship of the Universal Declaration of Human Rights, is to risk the (philosophical) production of concepts that, in a very practical way, feed the very kinds of conflict that they seek to overcome. Such then are the signs of the times and the perhaps increasingly urgent need of their interpretation, a reading that relies less on fixing the reality of transition than embarking on a

²⁰ For devotees of the notion that narrative will rally to solve our problems, Judith Butler’s recent work offers a compelling challenge, see her, *Giving an Account of Oneself* (New York: Fordham University Press, 2007). I borrow here from Butler’s position, along with the argument in Alexander Düttmann, *Between Cultures: Tensions in the Struggle for Recognition* (London: Verso, 2000).

~ Between the signs of transition's justice ~

road that allows us to glimpse and struggle with its potential, a making of ethical life which defies the banner of precedent.

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